#1,145 17 FEB 94

SPHEX CLUB
February 17, 1994
Robert C. Wood, III

SUPER CHIEF - DO YOU AGREE?

The American Revolution - Everyone here tonight has lived through an American Revolution - not just our colleague Mr. Booth, who was a close personal friend of George Washington and Lord Cornwallis. Booth has always had a knack for straddling both sides of the political fence. But the revolution to which I just referred did not erupt in Lexington and Concord, Massachusetts, over 200 years ago. The revolution to which I am referring, and will speak about tonight, had its fulmination in September, 1953 when President Eisenhower appointed Earl Warren to the position of Chief Justice of the United States, as a political favor for delivering the California delegation's support for his 1952 presidential nomination, a position to which Warren, himself, had aspired as a third-term Governor of California during the 1952 political season. A former state district attorney and Attorney General of California who was known as a vigorous, but fair and even-handed prosecutor, Warren was a devoted family man, father of six children, deeply religious, a lover of sports, hunting and fishing, and a pragmatic politician: He had favored the internment of the Japanese in California in 1941; in 1947

he had opposed redistricting of the state legislature to give the urban voters a greater number of representatives in the state legislature; and in 1948 he had been Dewey's Vice Presidential running mate. He was described by a former colleague: "He created a favorable impression. A big, good-looking, friendly, unpretentious man. He inspired confidence." But he did not condone political chicanery - he forever detested Richard Nixon for double-crossing him in the 1952 Presidential Campaign. As the adept leader of the Supreme Court during his fifteen year tenure, the fabric of our American, democratic enterprise, and the threads of our sociological, legal and political systems were dramatically changed by the decisions of the Warren Court, as it has become known to all of us. With Warren as the leader of the majority of the Justices, the Super Chief as he has been dubbed by his biographer, Bernard Schwartz, the lives of all Americans have been, and continue to be, affected in every aspect of our experience: the education of our children, the exercise of religion, our criminal justice system, the structure of state legislatures, freedom to speak and be politically incorrect, the right to privacy and most dramatically the right of minorities and outsiders to participate in American culture to the same extent as Whites.

I am going to examine the major decisions during the era of the Warren Court in three broad categories: Societal, legal, and political. All of you will be familiar with these decisions of the Warren Court. I want to know what you think about these decisions. Do you feel they enhanced the quality of American life, or do you think Earl Warren was a perpetrator of societal, legal and political chaos through a judicial philosophy nurtured by Warren that saw the Constitution as a document that lived and breathed according to the extant circumstances and mores of the American people, not an immutable, static document tied to a particular time in history.

I have made a list of the issues I will present tonight. I want your comments, reactions, views, concerns, thoughts and opinions about the judgments of the Warren Court. Do you agree or not? Is American society better or worse? Is justice now better served in our legal system? Does our political system now give a better response to the will of the people? Was Earl Warren the Super Chief?

It may help your thinking on these issues if you are familiar with the prevailing judicial climate at the time of Warren's appointment: the judicial compass tilted toward a philosophy of judicial restraint as opposed to

judicial activism. The chief proponent of judicial restraint was Justice Felix Frankfurter, the erudite former Harvard law professor who looked on every oral argument as an opportunity to pepper lawyers with penetrating questions, much like professors try to intimidate their students in the classroom. Frankfurter was a devoted follower of Oliver Wendell Holmes, who furnished the jurisprudential foundation for early 20th Century constitutional law. The tension between judicial restraint and judicial activism brew over the role of the judge in constitutional cases. There was a fundamental disagreement between the Holmes-Frankfurter's philosophy and Warren, Bill Douglas and Hugh Black's view of the role of the judge and the judiciary. The gap between their judicial philosophies was infrequently bridged during Warren's tenure as Chief Justice (an important exception being the Brown case). Holmes and Frankfurter's philosophical stone was their conviction that our constitutional system rested upon tolerance of political judgments and that its greatest enemy was the judicial absolute. Thus, it was not the judicial function to strike down laws simply because the judge may personally disagree with them. Holmes opined "there is nothing I more deprecate than the use of the Fourteenth Amendment to prevent the making of social

experiments that an important part of the community desires even though the experiments may seem futile or even noxious to me." Accordingly, in Holmes and Frankfurter's view, the legislator was to have the primary say on policy considerations behind the regulatory scheme of the legislative process, not the judge. So proponents of judicial restraint saw the judge's business to enforce laws the judge might believe to embody economic or social mistakes.

By the time Warren arrived as Chief Justice, there were cracks in the judicial fortress of restraint. Led by Douglas and Black, both of whom preceded Warren on the Court, they felt that Holmes canons of constitutional interpretation would not suffice in all instances of judicial review. For instance, in the area of personal liberties, judicial activists felt that there should not be deference to the legislature if a law infringed upon a personal right guaranteed by the Bill of Rights (sometimes these rights were not so readily discerned). If the Court had to defer to the legislative judgment about whether a statute is constitutional, then the Court had to yield its responsibility to another body that did not possess that responsibility. As you may recall, in the first great decision of John Marshall in Marbury v. Madison, the primacy of the Supreme Court to determine the constitutionality of all

laws was forever etched in the common law of our fledgling country much to the chagrin of Thomas Jefferson and the anti-federalists. Thus, to Warren and his followers the judiciary was vested with the supreme constitutional power and responsibility to pass on the validity of legislation. The Court could not defer to the legislative judgment without abdicating its own responsibility. Constitutional issues had to be based on a judge's good-faith judgment of a statute's constitutionality. To Frankfurter and the followers of judicial restraint this was constitutional heresy. They adhered to the judicial philosophy that the Court in exercising its power of judicial review must give deference to the decisions of the legislature in enacting a law and find a law constitutional unless expressly prohibited by the Constitution. Do you agree?

Perhaps it would be helpful to give an example of Frankfurter's judicial philosophy in two cases that came before the Supreme Court prior to Warren's appointment as Chief Justice. In Minersville School District v. Gobitis, 1940, Frankfurter delivered the opinion of the Court sustaining a state law making it compulsory for school children to salute the flag, even though the decision, from a personal standpoint, troubled him greatly. This is the deference that Frankfurter believed the Court must give to a legislative

enactment. Within three years in another case, West Virginia v. Barnett, the Supreme Court reversed itself and ruled the compulsory flag salute unconstitutional. However, Frankfurter stood his ground and delivered a dissent which included this personal comment: "One who belongs to the most vilified and persecuted minority in history (Frankfurter was a Jew) is not likely to be insensible to the freedoms guaranteed by our Constitution. Were my purely personal attitude relevant I should wholeheartedly associate myself with the general libertarian views in the Court's opinion, representing as they do the thought and action of a lifetime." In a letter Frankfurter stressed the basic difficulty in the flag case: "Here also we have an illustration of what the Greeks thousands of years ago recognized as a tragic issue, namely, the clash of rights, not the clash of wrongs. For resolving such clash we have no calculus. But, even in such a case, the individual preferences of the Judge have to give way: what weighs with me strongly in this case is my anxiety that, while we lean in the direction of the libertarian aspect, we do not exercise our judicial power unduly, and as though we ourselves were legislators beholding with too tight a rein the organs of popular government." This statement embodies the epitome of the philosophy of judicial restraint.

Warren rejected Frankfurter's philosophy because he believed that it thwarted the effective performance of the Court's constitutional role. In Warren's view, judicial restraint meant judicial abdication of the duty of the Court to enforce constitutional guarantees, and as a result for a long time courts had been sweeping under the rug a great many societal problems festering in American life. The Court had been derelict in failing to address and resolve social, legal and political ills. These issues of equality before the law had piled up, and they were now causing a great deal of dissention and controversy among our citizens. To Warren, and his followers, it was the Court's duty to prescribe remedies for ills of our society, regardless of the controversy involved. Do you agree?

Some years after his appointment as Chief Justice, President Eisenhower expressed surprise about the activistic nature of Warren, but he should not have been surprised. Warren had made known his liberalistic views several years before Ike appointed him. In an interview in the New York Times in 1948, Warren stated his political view of liberalism which underpinned his view of the jurist's role in our constitutional system. Liberalism "is the political belief, and the political movement arising out of the

belief, that the individual should be the all-important, precious object of consideration in every phase of social relationship. . . . civil rights, representative government, and equality of opportunity are all part and parcel of the liberal tradition. . ." He made clear his view that governmental institutions were designed to protect the individuals from domination either by government or by any privileged group. However, Warren eschewed the labels of liberal and conservative. "If I had the choice of classification, I would divide people politically into three groups - reactionary, progressive and radical. I particularly like the term, progressive, not necessarily as a party label, but as a conception. To me it represents true liberalism and the best attitude that we could possibly have in American life. It is distinguishable from both reaction and radicalism, because neither of these philosophies make for real progress." The reactionary, concerned only with his own position, and indifferent to the welfare of others, would resist progress regardless of changed conditions or human needs. The radical does not want to see any progress at all because he hopes that our democratic institutions will fail and that in the collapse he will be able to take over with some form of alien tyranny. The progressive, however, realizes that democracy is a growing

institution and that, if it is to succeed, we must make steady advances from day to day to constantly improve it and adapt it to human requirements on an ever widening base."

Warren's political judgments, expressed in this 1948 statement, carried over into his judicial philosophy, and served as the crucible which overcame the adherents of judicial restraint during the first years of the Warren era. American justice, embodied in the decisions of the Warren Court, would no longer be blind to the burning issues and growing societal problems of Americans in the early 1950's, many of which had been smoldering for over 100 years. Through his forceful, but gentlemanly leadership, Warren was able to instill in the brethren a social consciousness that gave to all Americans, regardless of race, wealth, or social position, equality before the law. Outsiders, the poor, the politically repressed or unpopular, minorities and even the obnoxious, would find protection of their rights, even if their rights conflicted with the political will of the legislature.

Let's look at some of the "burning" issues facing Americans in 1953. Let's begin with segregation: Negroes and Whites lived in a segregated society, that is in schools, in public accommodations, in politics, in

neighborhoods, in recreation, in public transportation, in business, all under the imprimatur of constitutional law that judged separate, but equal, did not offend traditional notions of equal protection under the Fourteenth Amendment. The Supreme Court in 1896 had given legitimacy to segregation in the notorious case of Plessy v. Ferguson, and the Court had continued to espouse the judicial philosophy of separate but equal as the American standard code of conduct. A great, smoldering question in the 1950's was whether Blacks, by the very act of enforced segregation, were being denied equal protection of law. There was virtually no escape for Negroes from the doctrine of separate but equal. Whites and Blacks went to their own schools, ate in their own restaurants, rode in separate parts of the bus or train, worshiped at their own churches, and played on their own separate fields, and if a Black or White protested, such as "sitting in", segregation was enforced by police and sheriff's departments and courts convicted protestors for violation of state laws that countenanced separation of the races.

In criminal law, the accused had no constitutional right to a lawyer, was not protected from self incrimination, was not necessarily secure in his home from illegal searches and seizures by local law enforcement

authorities, and was not protected from a state's invasion of his individual rights protected under the Bill of Rights.

In the political arena, legislatures were grossly imbalanced between rural and urban representation. Many disadvantaged persons could not vote because they could not pass literacy tests. The politically unpopular could be harassed and held civilly liable for expressing unpopular views; they could lose their livelihoods by failure to take a loyalty oath. Most state legislatures could pass laws that would allow local law enforcement officials to invade the privacy of the bedroom of a man and a woman.

Am I describing accurately America in 1953? I was only 13 years old. Some of you were older and wiser and experienced - like Booth, already a world renown athlete, journalist and emerging panhandler. Maybe some of you may think times were better then; however, for better or worse, Earl Warren irrevocably changed the way our government, state and federal, and our courts treated us, and how we treat each other in interchanges of life.

Now, let us look at some of the major cases which caused this revolution. In each instance, think to yourself, is America better off now than it was before Earl Warren and his brethren took pen to hand and made

decisions that changed the nature and fabric of our society. Do you agree or disagree with these decisions?

The first case decided by the Warren Court, and unquestionably one of its most important and controversial, was Brown v. Board of Education. The case had been argued during the 1952 term while Fred Vinson was still sitting as Chief. The case was perplexing to the Court. The Court knew that it was not only controversial in subject matter, but its decision would have a profound impact on the entire nation. Vinson appeared to favor ruling for the plaintiff, but there was no assurance that he would ever get a majority of the Justices to agree. Frankfurter, in spite of his philosophy of judicial restraint, came to look upon segregation as a moral as well as a constitutional abomination, but he was still skeptical of enforcing judicially his sociological view on the populace. Black, Douglas, Burton and Minton clearly indicated that they would rule classification by race as unconstitutional. However, the other Justices, Reed, Jackson and Clark seemed ready to dissent from any such ruling.

Vinson died before the case was decided. Ike appointed Warren Chief Justice. From the first day of his term, he had an uncanny ability to

lead in a quiet, but forceful and effective, manner. Through his skilled negotiating abilities, he was responsible for the unanimous opinion for the Court. In Brown, Warren and most of the Justices realized that the Court must present a unanimous opinion if its decision was to be accepted by the public.

The arguments advanced by the states were very similar: segregation of the public schools had been regarded as a matter of state policy, and court decisions (Plessy v. Ferguson) approved classification of people according to race for purposes of public schools. None of the lawyers for the state tried to defend segregation per se, but they argued that the state had the right direct its school boards, and school boards could dictate their own policies, including the right to require the White and Black races to attend their own schools.

Lead counsel, Thurgood Marshall's, answer was simple: that on the basis of separation, Negroes did not have equal protection before the law and equality of opportunity. The case hinged on the interpretation, (or reinterpretation) of the Fourteenth Amendment to the United States Constitution - the equal protection clause.

Justice Warren's words were simple and concise: he recognized that education was the most important function of state and local governments: there were compulsory attendance laws; great expenditures were made from the public pocket book to operate schools on all levels.

Justice Warren stated the question and answered it clearly and simply, "We come then to the question presented: Does segregation of children in the public schools solely on the basis of race, even though the physical facilities and other tangible factors may be equal, deprive the children of the minority groups of equal educational opportunities? We believe that it does. We conclude that in the field of public education the doctrine of "separate, but equal" has no place. Separate educational facilities are inherently unequal. [The plaintiffs] by reason of the segregation [have been] deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment."

Do you agree now, did you agree in 1954? Was the Court's decision a flagrant abuse of judicial power? Should an unelected body have the right under our constitution to make such a dramatic decision that

drastically affected the lives of the American people. Whatever you think, America changed forever on May 17, 1954.

The Brown decision embroiled the Warren Court in controversy. There were howls of protest, many southern politicians fumed that the states would not follow a political decision from a court. But the Warren Court did not back away from controversial and divisive issues. One of its next constitutional confrontations was prayer and bible reading in school.

Do think it is proper for the state to require or allow students to repeat a prayer in school or read the Bible? A majority of the Warren Court did not think so. Do you agree?

In Engel v. Vitale, the issue was a 22-word prayer that the School Board of New Hyde Park, NY directed the principal of each school to require that the prayer was said at the beginning of each day. "Almighty God, we acknowledge our dependence upon thee, and we beg thy blessings upon us, our parents, our teachers and our country." The prayer was not compulsory, that is children were free to leave the room while the words were being spoken. Justice Black, a Sunday school teacher of over 22 years, interpreting the First Amendment that said, "Congress shall make no law respecting an

establishment of religion stated that the Amendment "must at least mean that in this country it is no part of the business of government to impose official prayers for any group of the American people to recite as a part of a religious program carried on by government". Black concluded, "The Establishment Clause thus stands as an expression of principle on the part of the founders of our Constitution that religion is too personal, too sacred, too holy, to permit its "unhallowed perversion by a civil magistrate."

But the dissent thought otherwise. Justice Stewart believed the majority was wrong. He stated that New York had not interfered with the free exercise of anyone's religion because nobody had to recite the prayer. He concluded with all respect, I think the Court has misapplied a great constitutional principle. I cannot see how an 'official religion' is established by letting those who want to say a prayer say it. On the contrary, I think that to deny the wish of these school children to join in reciting this prayer is to deny them the opportunity of sharing in the spiritual heritage of our Nation." What do you think?

After the Engel decision, there were loud cries for an amendment to the Constitution to allow school prayer. "I do not intend to let nine men

tell 190 million Americans, including children, where and when they can say their prayers", said Senator Everett Dirkson. Should we have an amendment to allow prayer in schools? Presidents Bush and Reagan thought so.

Shortly after the Engel decision, the Supreme Court in Arlington School District v. Schempp prohibited reading of the Bible as part of a school program. A number of previous cases had raised this issue, but it had not been resolved. The cases before the Warren Court involved a unitarian family in Pennsylvania and a devout atheist in Maryland. The atheist parents argued that they were offended by the exposure of their son to Bible reading and the Lord's Prayer at the start of the day's classes in the Baltimore public schools.

In the Schempp case, there was only one dissent, Justice Stewart again. The Court rested its decision on the establishment clause of the First Amendment which had been made applicable to the states by the Fourteenth Amendment, in a 1940 decision. Please keep in mind at this time that not all of the rights contained in the Bill of Rights had been ruled applicable to the states through the Fourteenth Amendment, [but this rule of law was soon to change under Warren]. In the relationship between man and religion, the

Court held "the state is committed to absolute neutrality, forbidden to help or hinder" and said:

> "The place of religion in our society is an exalted one, achieved through a long tradition of reliance on the home, the church and the inviolable citadel of the individual heart and mind. We have come to recognize through bitter experience that it is not within the power of government to invade that citadel, whether its purpose or effect be to aid or oppose, to advance or retire."

What do you think? Does the reading of the Bible in the classroom ~~affect~~ offend the principle of neutrality of government towards religion?

Let us turn now to the Warren Court's constitutional analysis of the state's right to control the personal lives of its residents. In Loving v. Virginia, Warren led the brethren in a unanimous decision that held Virginia's miscegenation law violated the Fourteenth Amendment. Virginia had argued that the statute was not discriminatory since it applied equally to blacks and whites. Warren found this argument nonsensical. Warren reviewed the legislative history, and the Virginia trial court's own opinion, and concluded Virginia had passed this law to insure white supremacy. Warren's opinion contained a quotation from the trial justice that he said evidenced clear racism: "Almighty God created the races white, black, yellow and red, and he

placed them on separate continents." And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix.

Do you agree?

Does a state have the right to regulate conduct involving the privacy of its citizens and of intimate relations between husband and wife? For example, was it permissible for a state to prohibit dissemination of information about contraceptives or to prevent abortions. The basic constitutional question: whether privacy could be protected under the Constitution. This important issue had never been decided by the Court. True to form, Warren did not back away from the issue. (Remember the Supreme Court decides what cases it will take and decide.)

In Griswold v. Connecticut, the petitioners challenged Connecticut laws which prohibited providing information about birth control or contraceptive materials. This challenge put the privacy issue on the constitutional hotplate. Is privacy a right which is protected under the Fourteenth Amendment of the Constitution?

There have been a number of cases in which the Court had implied that the Constitution protected certain activities of a private nature, but there had been no direct decision from the Court on this issue. The Constitution never explicitly mentions privacy. A majority of the Court held that the right of privacy existed by implication rather than an expressed protect right. Douglas' opinion reflects a judicial activist approach to the Constitution; the necessity to extrapolate the broad intent of the framers and then apply that intent to modern circumstances. The dissenting justices, exercising restraint, believed that only those rights specifically mentioned in the constitution can be enforced against federal or state governments. Since privacy is not mentioned, there is no constitutional protection. It is a matter for the legislator, not the judge.

Douglas' opinion portrays classic judicial activism. He first stated that this Court does not sit as a super legislature to determine the wisdom, need and propriety of laws that touch economic problems, business affairs or social conditions. However, this law (the contraceptive law) operates directly on an intimate relation of husband and wife and their physician's role in one aspect of the relation.

Douglas cited examples where the Court had recognized that the First, Third, Fourth, Fifth and Ninth Amendments had a penumbra (fringe area) where privacy was protected from governmental intrusion. He referred to these penumbras as zones of privacy. For example, the First Amendment does not only protect the right to speak freely, but also the right to distribute information, the right to receive information, right to read, and the freedom to teach - rights not specifically mentioned in the First Amendment. Yet, in Douglas' opinion, without these peripheral rights the specific rights would be less secure. So he concluded that the right of privacy is a legitimate one and protected under the Constitution. The Connecticut law fell under the protection of individual right and privacy.

The dissent, written by Stewart, is a classic statement of judicial restraint. I shall read it;

> "I think this is an uncommonly silly law. But we are not asked in this case to say whether we think this law is unwise, or even asinine. We are asked to hold that it violates the Constitution. And that I cannot do. In the course of its opinion the Court refers to no less than six Amendments to the Constitution but does not say which of these Amendments, if any, it thinks is infringed by this Connecticut law. We are told that the Due Process Clause of the 14th Amendment is not, as such, the

"guide" in this case. With that much I agree. There is no claim that this law is unconstitutionally vague or that the appellants were denied any of the elements of procedural due process at their trial. And the day has long passed since the Due Process Clause was regarded as a proper instrument for determining "the wisdom, need, and propriety" of state laws...

"As to the First, Third, Fourth and Fifth Amendments, I can find nothing in any of them to invalidate this Connecticut law, even assuming that all those Amendments are fully applicable against the States. To say that the Ninth Amendment has anything to do with this case is to turn somersaults with history. The Ninth Amendment, like its companion the Tenth, was simply to make clear that the adoption of the Bill of Rights did not alter the plan that the Federal Government was to be a government of express and limited powers. What provision of the Constitution, then, does make this state law invalid? The Court says it is the right of privacy "created by several fundamental constitutional guarantees." With all deference, I can find no such general right of privacy in the Bill of Rights, in any other part of the Constitution, or in any case ever before decided by this Court. At the oral argument we were told that the Connecticut law does not "conform to current community standards." But it is not the function of this Court to decide cases on the basis of community standards. If, as I should surely hope, the law before us does not reflect the standards of the people of Connecticut, they can freely exercise their true Ninth and Tenth Amendment rights to persuade their elected representatives to repeal it. That is the constitutional way to take this law off the books."

With whom do you agree; Douglas or Stewart? By the way, Griswold lay the constitutional foundation for the notorious, infamous landmark decision in Roe v. Wade in 1973. Warren had retired and can't take any of the blame or credit for this decision.

Let's move to the political area. No cases have had a greater impact than Baker v. Carr and Reynolds v. Sims.

Until 1962, state legislatures had complete control over how they apportioned legislative seats. Some seats use population as the main criterion so that each district had roughly the same number of people. Other states, however, deliberately malapportioned districts for political purposes: to exclude blacks, to limit the influence of urban groups, or to simply keep power in the hands of established groups. Before 1960 this was not a justiciable issue, that is it was not a proper subject for resolution by the judiciary. Proponents of this view claimed that the makeup of political districts, whether for congressional seats or for state assemblies, constituted a political question. This position was reflective of Frankfurter's philosophy of judicial restraint: the reapportionment of state legislatures was beyond the competence of a court. The first hint of the change of attitude came in

Gomillion v. Lightfoot in 1960 when the Court struck down a blatant gerrymandering scheme in Alabama designed solely to disenfranchise Black voters in Tuskegee. Two years later the famous case of Baker v. Carr was decided. In Baker the Court agreed that apportionment cases were in fact justiciable, not merely political questions. However, the Court reserved for the future a determination whether reapportionment schemes which favored certain groups violated equal protection.

The Court answered the question in Reynolds v. Sims, a case resulting from an Alabama reapportionment plan which had not changed since 1900, although the population of the state had grown considerably, and the state constitution required reapportionment every ten years. The Supreme Court held, with Warren writing the majority opinion, that the equal protection clause required that seats in both houses of a state legislature be reapportioned on the basis of population so that one person's vote counted equally with another.

In a blistering dessert, Justice Harlan wrote that the history of the Fourteenth Amendment made its conclusion that the authors of the Fourteenth Amendment did not intend to limit the power of the states to

apportion their legislatures as they saw fit. He decried the Warren mandate that excluded any other basis for the formation of election districts such as economics, geography, theories of bicameralism, or balance of rural versus urban interests.

Do you agree with the Baker and Reynolds cases; should the Court have entered the political thicket? Would it have been better to leave the so-called political questions alone? Would politicians have reapportioned their seats to reflect population shifts? Should there be criteria other than population as a lawful basis for the composition of state legislature?

There can be no question that never in American history has a single judicial decision opened the gates for such a massive change in the nation's political structure. Judicial activists were launched into the field of reapportionment of state legislatures. There decisions gave impetus to the passage of the Voting Rights Act by Congress, a law which Virginia still labors.

The Warren Court entered the political thicket of loyalty oaths, many of which had been passed by state legislatures after the invective of McCarthy and his devotees about communists in government or on the faculties of colleges and universities. These oaths were knocked out by the

Warren Court on the basis of vagueness, guilt by association, and prosecuting innocent conduct such as giving legal advice to the communist party.

Do you recall what the John Birches dubbed "Red Monday" - January 17, 1957? On this day in four cases, Warren forever incurred the wrath of the right wingers, and the cry went out - impeach Earl Warren. What did the Warren Court decide to launch such a churlish reaction by his opponents? On this day, the Court reversed (a) a dismissal of an employee from the State Department for failure to take a loyalty oath, (b) a conviction of a communistic leader under the Smith Act, (c) a conviction for contempt of the House Committee on Un-American Activities, and (d) conviction for contempt of a state legislature investigating subversive activities. In a pamphlet entitled "Nine Men Against America" Warren was vilified for (a) stopping a congressional investigation of communists, (b) voting in favor of advocating treason, and (c) clamping down on the rights of states to protect their students against subversive teachers.

Are these appropriate excursions of the judiciary in the political scene?

Literary tests had their demise under the Warren Court. Warren held that a provision in the Voting Rights Act which gutted New York literacy tests was a permissible exercise of legislative power.

Free speech, particular in a political setting even the politically incorrect, had always been considered a fundamental freedom before the Warren era. Justice Holmes had said "if there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought - not free thought for those who agree with us, but freedom for the thought that we hate." Warren expanded this ideology in the civil arena in the case of New York Times v. Sullivan. The Court held that a newspaper could not be held liable for comments about "public officials" unless the newspaper acted with malice, that is the paper knew the information was not true or acted in wanton and willful disregard of the truth." Justice Brennor, writing for the majority, justifying the place of untruths in public debate, said "a false statement brings about the clearer perception and livelier impressions of the truth, produced by its collision with error." Do you agree?

I will conclude with perhaps Warren's greatest contribution to individual liberty - the rights of those accused of criminal conduct.

In case after case the Warren Court assured that there was equal justice under the law, for the poor, disadvantaged, and minorities. The seminal case arose from a petition filed pro se by a drifter named Clarence Earl Gideon. He wrote a letter to the Supreme Court from his Florida prison cell. He had been unable to afford a lawyer when brought to trial in December of 1961. Gideon had asked the judge to appoint counsel to handle his defense on a charge of breaking and entering. The trial judge refused. The Florida law was like most of the state laws at this time: the Court could appoint counsel for indigent defendants only in capital cases. This was an anathema to Warren and had been since his days as prosecutor in California. Persons accused of a serious offenses in California had legal representation. Warren had been ahead of his time in providing legal counsel for the accused.

Prior to Gideon's petition, the Supreme Court had held in Betts v. Brady (1942) that based on historical data, the appointment of counsel was not a fundamental right, essential to a fair trial. Thus, the Sixth Amendment right of guarantee of counsel was not obligatory upon the states under the

due process clause of the Fourteenth Amendment. The constitutional principle was, however, clearly stated in the Betts case: guarantees of the Bill of Rights which are fundamental safeguards of liberty that cannot be abridged by the federal government likewise are equally protected from state invasion by the due process clause of the Fourteenth Amendment. Justice Black simply concluded the Betts decision was wrong, overruled it, and held that the Sixth Amendment guarantee of counsel in a criminal proceeding is a fundamental right of a citizen that may not be abridged or limited by the state, and counsel must be provided under the due process clause of the Fourteenth Amendment. Do you agree?

Perhaps the most controversial case decided by the Warren Court was Miranda v. United States. Miranda had been arrested and taken to the police station under suspicion of kidnapping and rape. Two officers questioned him without an attorney present, and at some point told him he did not have to talk, but that any statement he made could be used against him. After two hours, without any coercion or threats, Miranda confessed and signed a statement which later helped to convict him.

The Fifth Amendment privilege against self-incrimination, like all rights, can be waived, provided it is waived voluntarily and knowingly. Beginning in the 30s, the Supreme Court imposed restraints on what constituted a voluntary confession. Physical abuse, interrogation to the point of exhaustion and solitary detainment had been all too common in this country, particularly when the accused was poor and uneducated. Between the two extremes of police brutality and the criminal who cannot wait to confess, it was very difficult to determine when a suspect had voluntarily confessed. The Miranda rules not only protected the accused, they also provided courts with a simple beginning test: if Miranda warnings are not given, any confession will be deemed involuntary.

You are all familiar with the Miranda warnings. They are very simple: (1) you have the right to remain silent, (2) anything you do or say may be used as evidence against you in the court of law, (3) you have the right to have an attorney present during questioning, and (4) if you do not have the funds to secure an attorney, one will be provided for you. In Gideon, the Court came to recognize the right o counsel for all citizens. In Miranda, the Court extended this right to the jail houses when interrogation

of the accused by the police was taking place. The Court recognized the most important time for a person to obtain an attorney is during the interrogatory stage where the environment is intimidating and police can frighten a person into a confession.

Justice Harlen dissented. He believed that the Miranda decision represented poor constitutional law and entailed harmful consequences for the country at large. He states, "How serious these consequences may prove to be only time can tell."

Do you agree with Justice Harlen? Have the consequences of Miranda proved to be harmful in the enforcement of our criminal laws, or do you affirm Chief Justice Warren's judgment that the right to counsel at the interrogatory stage is a fundamental right to which all Americans, rich or poor, should be secured in?

The last significant case which I want to discuss is Map v. Ohio. As I have mentioned, before the Warren Court, criminal justice in the United States had traditionally operated under a double standard, federal courts had been bound by one set of rules, state courts by another. For example, illegally obtained evidence had been barred from federal courts since 1914, but at the

time Earl Warren became Chief Justice, it was still admissible in courts of more than half the states. The right of people to be secure in their businesses, houses, papers and effects against unreasonable searches and seizures had not been recognized by the Supreme Court as a fundamental and essential right incorporated in the due process clause of the Fourteenth Amendment. The citizens of this country who were generally affected by this double standard were the poor and uneducated.

In Warren's first term (1954) the Court was presented with the opportunity to incorporate the guarantees of this Fourth Amendment (unreasonable search and seizure) into the due process clause. Warren sided with the majority in upholding the conviction of Patrick Irving, who had been convicted of book making after the police had stolen into his home, planted a microphone in his bedroom, and recorded his conversations with his wife and customers. Warren cast the deciding vote to affirm Irving's conviction. While he was deeply troubled by the conduct of the police, he voted to affirm the conviction in the forlorn hope that the Court in strongly worded displeasure at these obnoxious police practices might prompt California and other offending states to clean up their criminal proceedings.

Unfortunately questionable police practices continued. Seven years later when the Map case came before the Court, the Warren Court provided a remedy for a violation by the state of the Fourth Amendment. The facts are comical. Dollree Map was arrested in Cleveland, Ohio. Acting on information that Ms. Map had stashed away some "policy paraphernalia," police officers called on her, pried open the outside screen door of her home, then broke into the front hall, where they were confronted by Ms. Map who asked to see their search warrant. A paper of dubious authenticity was brandished. Ms. map grabbed it and stuffed it in her bosom. The officers retrieved it and after a struggle handcuffed her. They force her to accompany them upstairs where after a thorough search of her bedroom and then other parts of her house, the officers found lewd pictures and pamphlets that Ms. Map said had been left by a former boarder. At her trial the police failed to prove a search warrant had ever been issued, but Ms. Map was convicted under a state statute for knowingly possessing obscene literature.

With Warren writing the opinion, the Supreme Court reversed. A majority of the justices affirmed the right of a free people to be secure in their homes against unlawful entry of law enforcement officers, and that this

was a right secured to them under the Fourteenth Amendment. Illegally obtained evidence would no longer be admissible as evidence in any court of the United States, state or federal.

Do you agree? Was Earl Warren the Super Chief? Let me hear what you think.